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IN THE COURT OF APPEAL

CRIMINAL DIVISION



Neutral Citation Number: [2020] EWCA Crim 1366

CASE NOS 202000744/B2 & 202001789/B2

Royal Courts of Justice  
Strand  
London  
WC2A 2LL

Tuesday 20 October 2020

LORD JUSTICE HOLROYDE  
MRS JUSTICE MAY DBE  
MR JUSTICE ANDREW BAKER

REGINA  
V  
NILMONI SINGH

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Miss S Vine appeared on behalf of the Appellant

Mr G Venturi appeared on behalf of the Crown

**J U D G M E N T**

1. LORD JUSTICE HOLROYDE: On 22 November 2019 in the Crown Court at Portsmouth, this appellant was convicted of an offence of sexual assault, contrary to section 3 of the Sexual Offences Act 2003. On 26 June 2020 he was sentenced to 18 months' imprisonment. He now appeals against his conviction by leave of the single judge. His application for leave to appeal against sentence has been referred to the full court by the single judge.
2. The complainant, to whom we shall refer as "S", is entitled to the protection of the Sexual Offences (Amendment) Act 1992. Accordingly, during her lifetime no matter may be included in any publication if it is likely to lead members of the public to identify her as the victim of this offence.
3. In May 2017 the appellant, a married man of previous good character then aged 49, was the manager of a restaurant in Bognor Regis. S had very recently started part-time work as a waitress at the restaurant. She was 17 at the time. She is affected by Autistic Spectrum Disorder ("ASD").
4. The events giving rise to the conviction occurred on 20 May 2017, on her second or third weekend of working. S alleged that during the evening the appellant touched her inappropriately on her leg, moving his hand up her thigh to her crotch. She further alleged that when she left the restaurant at the end of her work, the appellant, who was parked outside, beckoned her over to his car and told her to get in. She did so, and he drove her to the housing estate on which she lived, stopping a short distance away from her home. He then put his hand down her back and inside the waistband of her jeans. She tried to move and he put his hand down the front of her jeans and inside her underwear. He touched her vagina with his fingers but did not penetrate her because she was wearing a tampon. He kissed her using his tongue. She then managed to get out of the car. As she did so, the appellant gave her £10. She took a circuitous route to her home because she did not want him to see her. Within a short time she had reported the appellant's conduct to a friend, by phone, and to her mother, who was in the house. The evidence of her mother was that S looked white as a sheet when she returned and began to tremble and sob before disclosing what had happened.
5. The appellant was charged on an indictment containing three counts of sexual assault. Count 1 reflected the allegation of touching in the restaurant, count 2 the alleged touching of S's genitalia whilst in the car and count 3 the alleged kissing of S whilst in the car.
6. The appellant's case was that these allegations were untrue. There had been no inappropriate touching in the restaurant. At the end of the evening S had asked him for a lift home. During the journey he had tried to help her put her seatbelt on, and as he did so his hand had accidentally slipped down inside the back of her jeans but not inside her underwear. He denied any touching of her genitalia. He gave her £10 because she had earlier asked him if she could have some extra cash as she was struggling with money. When he did so she kissed him goodbye. That was the only kiss.
7. At the trial, as in this court, Miss Vine represented the appellant and Mr Venturi represented the prosecution. The prosecution had disclosed, as unused material, medical and educational records relating to S. Miss Vine wished to adduce some of this material in evidence on the basis that it was relevant to the central issue of whether S was a truthful, accurate and reliable witness. She recognised, rightly, that the evidence which she wished to adduce would be put forward as evidence of S's bad character and therefore



- iv. (6) A statement is not admissible under this section if the court makes a direction to that effect under subsection (7).
- v. (7) The court may make a direction under this subsection if satisfied that the statement's reliability as evidence for the purpose for which it is tendered is doubtful in view of—

(a) its contents,

(b) the source of the information contained in it,

(c) the way in which or the circumstances in which the information was supplied or received, or

(d) the way in which or the circumstances in which the document concerned was created or received."

- 9. One of the documents related to a medical assessment of S in May 2016. In answer to a question as to whether S lies and cheats, S had replied "True" and her mother had replied "Partly true". In advance of the trial, they had been asked by the police why they had given those answers: each had made a witness statement to the effect that S was generally truthful, but when asked how she would sometimes say she was "okay" even though she was not, because she did not want to talk about her feelings. Miss Vine was permitted to cross-examine both S and her mother about the answers given in that assessment.
- 10. We can summarise the gist of the other documents on which Miss Vine wanted to rely. They were:
  - A. An undated Learning Support Unit Referral Form, in which it was said that S manipulated others, needed attention and looked to blame others.
  - B. Documents passing between S's college and the local authority's Young People's Service, which referred to S's attention-seeking behaviour and tendency to over-dramatise her medical problems and embroider the truth.
  - C. A school record from December 2015 indicating that S had been suspended for half a day for attacking and punching a girl in her class who had kicked her chair, and an NHS assessment from May 2016 in which it was said that S had no sense of consequence when she physically hurt someone and no way of putting the brakes on when she began an attack.
- 11. These latter documents were said to be relevant to rebut an assertion made by S in her video recorded evidence that she was "not very brave towards men".
- 12. The application to adduce that evidence was opposed by Mr Venturi. In argument, the submissions appear to have become focused on whether the documents were admissible as business records. The judge ruled that they were not. He accepted that the requirements of section 117(1) and (2) were satisfied, but considered the statements to be of doubtful reliability within the meaning of section 117(7). His concerns, in essence,

were that Miss Vine wished to rely on the statements of opinion contained in the various documents, but the sources of the information on which the opinions were based, and the relevant experience of the persons expressing the opinions, were entirely unclear. It was, for example, unclear whether the makers of the statements knew anything about S's ASD. Their ability to express opinions and the reliability of those opinions were therefore not known. In the judge's view it was dangerous to allow the various opinions, which went to the issue of credibility which was at the heart of the case, to go before the jury in such circumstances. He therefore excluded the evidence but permitted Miss Vine, if she wished, to cross-examine S as to whether she had been suspended from school for attacking a fellow pupil.

13. In view of the way in which the judge had expressed his ruling, Miss Vine subsequently applied for the jury to be discharged so that she could try to arrange for the authors of the various documents to provide direct evidence as to the matters recorded. The judge refused that application. He noted that the relevant documents had been available to the defence for some time, but observed that the real difficulty faced by the defence was that the proposed evidence never could go far in seeking to challenge S's credibility.
14. The appellant's mobile phone had been seized by the police. Examination of it had received a few text messages passing between the appellant and S on the subject of her hours of work, and a small number of internet search terms on which Mr Venturi wished to rely. The sequence of relevant phone records was this. On 6 May 2017, S contacted the appellant to say that she would be happy to work for him. On 10 May, between 21.42 and 23.15, internet searches were made under the search terms "underage", "what age is underage?" and "sexual age". On 14 May, between 10.34 and 10.50, there were messages about S's attendance for work. Then at 15.40 there was an internet search under the term "local sex Bognor Regis". On 14 to 15 May, between 20.20 and 01.01, there were texts relating to S's attendance for work. Further text messages relating to her attendance for work were exchanged on 15, 16, 17, 19 and 20 May.
15. Mr Venturi submitted that these searches had probative value because they showed a man who was working away from home with an interest in having sex, an interest which would include S or others of her age. It was not, he said, bad character evidence because the making of the searches was not reprehensible conduct.
16. Miss Vine applied to exclude this evidence under section 78 of the Police and Criminal Evidence Act 1984. She complained that the appellant, whose phone had been taken from him in 2017 and who had had no access to it or its contents until a download of the results of the analysis of the phone was served about a month before the trial, could not reasonably be expected to remember what internet searches he had made, what internet searches may have been made by someone else using his phone or why any particular search had been made. He was therefore put in the difficulty of being deprived of an opportunity to give a proper and full explanation for the various search terms. Miss Vine submitted that the material had been selectively presented by the prosecution and might be a misrepresentation of the full facts. The evidence, she argued, would have little or no probative value but would be highly prejudicial in the circumstances of the case.
17. The judge gave a very brief ruling that the evidence should be admitted because the search terms entered into the phone were relevant to the appellant's thinking.
18. The trial proceeded. The appellant gave evidence. His case in relation to the use of his

mobile phone was that he had no knowledge of any search relating to sex in Bognor Regis. It was possible that someone at work had been messing around with his phone. He may have been interested in researching the legal age of consent because his son was about that age.

19. In summing up, the judge reminded the jury that a police officer had exhibited a record of the search terms and had confirmed in cross-examination that the appellant's phone had been taken in 2017 and the download of the analysis only served in 2019. The judge added: "I am going to leave you to study those as you see fit." No further or other direction was given as to the use which the jury could properly make of this evidence.
20. Later in the summing up, the judge reminded the jury of the appellant's evidence to the effect that he had no recollection of making any search relating to sex in Bognor. He did not specifically remind the jury of the appellant's explanation that any search about the age of consent may have been connected with the age of his son.
21. The jury convicted the appellant on count 2. They returned not guilty verdicts on the other two counts.
22. There are three grounds of appeal against conviction. They challenge respectively the judge's refusal of Miss Vine's bad character application, his refusal subsequently to discharge the jury and his refusal of Miss Vine's application to exclude evidence pursuant to section 78 of the Police and Criminal Evidence Act 1984.
23. We are grateful to both counsel for their written and oral submissions. Miss Vine argues that the material which she sought to admit was relevant and probative, that the judge was wrong to exclude it pursuant to section 117, and that having so excluded it he was wrong to deny the appellant the opportunity to resolve any concerns about the hearsay nature of the evidence by calling the relevant witnesses. She goes on to repeat her submission to the judge that the evidence of searches made using the appellant's mobile phone was of little or no probative value but was prejudicial to the appellant's case. Mr Venturi has succinctly resisted the various submissions.
24. Having reflected on the submissions of counsel, we can take grounds 1 and 2 together. The judge had to consider whether the evidence was admissible as evidence of S's bad character pursuant to section 100 of the 2003 Act and, if so, whether the evidence could be presented in the form of hearsay pursuant to section 117.
25. We think it unfortunate that the submissions and ruling came to focus on the section 117 strand of the argument. The correct starting point was whether any evidence to the effect of the contents of the documents, whether given orally as direct evidence or adduced as hearsay, was admissible at all. Miss Vine had correctly identified that this was bad character evidence, and therefore only admissible through one of the routes identified in section 100(1). Paragraphs (a) and (c) were plainly inapplicable: none of the material which the appellant wished to adduce was important explanatory evidence and there was no agreement to its admission, save in respect of the one limited aspect to which we have referred. As to paragraph (b), S's credibility was obviously an important issue, indeed the important issue, in the case. However, we have no doubt that none of the evidence which Miss Vine wished to adduce in evidence could pass the test of having substantial probative value in relation to the credibility of S's evidence at the trial. The documents contained opinions expressed in the very different context of assessing S's behaviour in school and, as the judge identified, contained no detail from which one could ascertain either the basis for the expressions of opinion or the capability of the

maker of the statements to express such opinions. In our view, none of this material could shed any reliable light on whether S was telling the truth to the jury about the conduct of the appellant in May 2017.

26. We note that in Moody [2019] EWCA Crim. 1222, a case of assault by penetration, the court upheld convictions where the judge had refused to admit evidence of the complainant's poor behaviour at school about two years before the sexual assault, including evidence of aggressive and anti-social behaviour and an ability to make a false allegation. In the present case, although the judge's ruling was focused on section 117 of the 2003 Act, his reasons for regarding the evidence as being of doubtful reliability were the reasons why the evidence could not have substantial probative value under section 100(1)(b). We are therefore satisfied that the judge reached the correct result in refusing to admit this evidence.
27. It follows from what we have said that there would have been no purpose in discharging the jury to enable the defence to call the authors of the various documents. Even if direct evidence were given by those authors, there was nothing in the content of the documents which could be admissible under section 100.
28. For those reasons, we see no substance in grounds 1 and 2.
29. Ground 3 arises from the ruling of the judge on Miss Vine's application to exclude the evidence relating to the mobile phone analysis. Again, there is an antecedent question as to whether the evidence was admissible at all. It was not relied on by the prosecution as evidence of a relevant propensity. Mr Venturi submits that even if it had been, it would not come within the definition of bad character evidence. He sought to rely on this evidence as showing that the appellant had an interest in having sex, including with S or with other girls of her age. As we have indicated, the judge in his ruling found the evidence to be admissible on the basis that it "showed his thinking".
30. Mr Venturi accepts that there was no evidential basis on which the prosecution could link the searches to a specific sexual interest in S, and nor was there any immediate connection in time between any of the searches and the relevant contact between the appellant and S. Those features are not in themselves necessarily fatal to the admission of evidence shedding meaningful light on the motivation underlying a defendant's actions. In the circumstances of this case, however, we take the view that such probative value as the evidence could have was very limited.
31. We agree with Miss Vine that the evidence was clearly capable of having a prejudicial effect. It could be regarded by the jury as casting the appellant, a married man who worked away from home, in a very poor light on moral grounds which were not in law relevant to the jury's verdict.
32. Most importantly, the application on which the judge was asked to rule was an application to exclude the evidence on grounds of fairness. The brief ruling which the judge gave, with respect to him, did not address that application at all. No doubt he had the argument well in mind, because it had been the subject of Miss Vine's submissions. But the judge gave no reasons for concluding that the probative value of the evidence outweighed its prejudicial effect. He made no reference to Miss Vine's submission that it would be seriously unfair to admit evidence of an extract from search records made years before the trial when the appellant had been handicapped by the passage in time in remembering precisely what use he had made of his mobile phone on the relevant dates. Nor did the judge specifically address the issue of whether any distinction was to be

drawn, in striking the balance between probative value and potential prejudicial effect, between the search relating to sex in Bognor Regis and the searches relating to the legal age of consent.

33. In those circumstances, we accept Miss Vine's submission that the judge fell into error in ruling against the application to exclude. The question then arises of whether that error renders the conviction unsafe. After careful thought, we conclude that it does not. The evidence on count 2 was very strong. S had immediately told both her friend and her mother about what had happened in the car and had displayed clear distress; and the appellant admitted that his hand had at least strayed down the back of her trousers and that he had given her money at the end of their encounter. The explanation which he gave for those features of his conduct were likely to be regarded by the jury as unconvincing. The jury cannot have been affected by any general prejudice arising from the contentious evidence, for if they had been they would surely have convicted of all counts, or at least of both counts 2 and 3.
34. We are therefore satisfied that the conviction is safe notwithstanding the error into which the judge fell in one of his rulings.
35. We turn to the application for leave to appeal against sentence. There has been, for reasons with which counsel have assisted us, a very unfortunate delay between the date of conviction in November 2019 and the date of sentence in June 2020. Such a long delay was difficult for the appellant and difficult for S. Then when sentence was imposed the judge acceded to an application for bail pending appeal. He had no power to grant bail in the circumstances of this case. The power of a Crown Court judge to grant bail pursuant to section 81(1)(f) of the Senior Courts Act 1981 only arises in the limited circumstance where the trial judge has certified fitness for appeal, and even then should only be exercised in exceptional circumstances.
36. We understand of course why both Miss Vine and the judge were concerned that the appeal against conviction, for which leave to appeal had already been granted by the time of the sentencing hearing, might not be heard by this court until the appellant had served a substantial part of his sentence. The obvious solution for that concern, however, was for the Registrar to be asked to take steps to arrange an expedited hearing, with an application for bail to be made if necessary to this court should there be, for any reason, further delay. The regrettable result is that the appellant now faces the prospect of imprisonment after the passage of several more months.
37. In determining sentence, the judge was required to follow the relevant definitive guideline published by the Sentencing Council. It was common ground, and we agree, that under that guideline the harm fell into category 2 by reason of the touching of S's naked genitalia. As to culpability, the judge found that the case fell into category A on the sole basis of an abuse of trust. The judge explained that decision in these terms:
  - i. "You were 49, she was very young. You were her superior at work. And therefore in my judgment this is a category 2A case."
38. Miss Vine draws our attention to the case of Ashton [2016] 1 Cr.App.R (S) 32, in which the appellant had sexually assaulted a member of his bar staff after they had both been drinking. The sentencing judge held that the offence was committed in breach of trust because the victim was the appellant's employee and the offences were recorded. On



appeal, it was held that there was not such a breach of trust as was contemplated by the relevant guideline and that the judge had therefore been wrong to put the case into category 2A. The court said, however, that in assessing the seriousness of the offence within the category 2B range,

- i. "there was not total equality between the two parties concerned in relation to what took place and the age and circumstances of the victim of these offences is something that should very properly be reflected in the sentence in relation to the culpability of the appellant."

39. There are of course differences between that case and this, and decisions as to whether an offence constituted an abuse of trust are necessarily fact-specific. The decision in Ashton does however illustrate the important point that the mere existence of an employer/employee relationship is not in itself sufficient in all circumstances to justify a finding that an offence was an abuse of trust. In each case, a close examination of the facts is necessary and a clear justification should be given if abuse of trust is to be found. The relationship must be one which would give rise to the offender having a significant level of responsibility towards his victim on which the victim would be entitled to rely.
40. In the present case, the appellant certainly took advantage of a young victim with certain vulnerabilities, and he had used his knowledge of her as her employer to get her into his car and then to take the opportunity of giving her a lift home to commit this sexual assault. Certainly those were serious aggravating features. However, the jury had acquitted on count 1, and in all the circumstances of this case the judge was in our view wrong to find that there was an abuse of trust such as would put the case into category A. The reasons which he gave for so finding were in our judgment insufficient to permit him properly to do so.
41. The case therefore fell within category 2B, for which the guideline indicates a starting point of 12 months' custody and a range from a high-level community order to two years' custody. The aggravating features were the substantial disparity in age, S's vulnerability because of her ASD, and the cynical way in which the appellant had taken advantage of their respective positions to secure her presence in his car and the consequent opportunity to assault her. There was significant mitigation, as the judge rightly found, in the appellant's previous good character, in the delay which he had suffered before being sentenced, in the clear adverse consequences of imprisonment not only for the appellant himself but also for his family and his small business, and in the effect of the Covid-19 pandemic on the conditions in which the appellant would be likely to serve his time in custody. In our judgment, those factors balanced one another out, with the result that the appropriate final sentence was that which was also the starting point before consideration of aggravating and mitigating features, namely 12 months' imprisonment.
42. Despite Miss Vine's submissions and the care with which they were made, we are satisfied that that sentence must be served immediately.
43. We therefore dismiss the appeal against conviction. We grant leave to appeal against sentence. We allow that appeal to the extent that we quash the sentence of 18 months' imprisonment and substitute for it a sentence of 12 months' imprisonment.
44. Miss Vine, the appellant will have to surrender. We are prepared to say 4.00 pm at his local police station, if you can identify that to us.
45. MISS VINE: Thank you, my Lord. It is Forest Gate.
46. LORD JUSTICE HOLROYDE: Thank you. Mr Singh should understand, Miss Vine,

that we are granting him a degree of indulgence here. We could require him to surrender to the cells downstairs. We think in all the circumstances it is appropriate that he surrender from his home to his local police station by 4.00 pm this afternoon.

47. MISS VINE: I am most grateful. I will make sure Mr Singh understands that.

48. LORD JUSTICE HOLROYDE: Although this will be of less immediate concern, the reduction in sentence does not alter either the notification period or the amount of the surcharge.

49. MISS VINE: I am grateful.

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